90-470

No.

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SUSAN GLASBRENNER,

Petitioner,

vs.

ROBERT M. SAPIO, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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QUESTIONS PRESENTED

1. Is it a denial of a liberty interest without due process of law contrary to the Fourteenth Amendment for a judge who controls the custodial fate of children in a matrimonial matter to refuse to hear them when they want to express their custodial wishes?

2. Is it a denial of a liberty interest without due process of law contrary to the Fourteenth Amendment for a judge to continue to enforce a consent order as to custody where the consent was not informed and has now been withdrawn, and to refuse to hold a hearing at the request of the formerly consenting parent where there has never been a hearing to determine the best interests of the children and there has been a substantial change of circumstances since the consent order was entered?

OPINIONS BELOW

The unreported decision of the New Jersey Superior Court, Appellate Division, for which a writ of certiorari is sought, is reproduced in the Appendix; it is paginated as 1D etc. because the Appendix to petitioner's appellate brief to that court is referred to in her petition for the writ (as 1a, etc.) and she thus hopes to avoid confusion. Also reproduced (that, is, retyped)* are the orders of the New Jersey Supreme Court denying certification and denying petitioner's motion for reconsideration (the latter was entered June 11, 1990).

*(to conform to the space requirements of the Rules of the Supreme Court of the United States)

JURISDICTION

On February 6, 1990, the Superior Court of New Jersey, Appellate Division, in an unreported, two-judge per curiam opinion, affirmed "in all respects" the judgment of the Chancery Division, Family Part, denying petitioner's request for a hearing in this custody matter, where there has never been a hearing. That affirmance included the refusal of the Chancery Division judge to talk with the children who, petitioner asserts, want to tell the judge their custodial wishes.

Petitioner argued in her appellate brief that the judge's refusal to talk with and listen to the children had denied them "the due process to which they are entitled" (Pb40); the Appellate Division "disagreed" with her contention that the children "have a right to be heard." (29D,13-19.) Petitioner had also

argued in her appellate brief her due process right to a hearing on the issue of custody. (Pb39-40.)

Petitioner petitioned the New Jersey Supreme Court, which has discretionary jurisdiction, for certification; it was denied by an order entered May 4, 1990. Petitioner filed a timely motion for reconsideration, which was denied by order entered June 11,1990.

Petitioner invokes the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257 (3) because a "right ... is ... claimed under the Constitution ... of ... the United States," the right of due process under the Fourteenth Amendment:

Article XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is important here to note that the New Jersey Constitution does not contain a "due process" clause. What may be considered a comparable provision is N.J. Const., Article 1, paragraph 1:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

In New Jersey case law, "fundamental fairness" is used as a state counterpart to "due process." Therefore, when the term "due process" is used in New Jersey litigation, it is intended to refer to the right guaranteed by the Fourteenth Amendment. Petitioner so intended it in this case.

STATEMENT OF THE CASE

Petitioner and respondent were married in 1978. Two children were born of the marriage: Robert (Bobby), born September 22, 1982, and Katherine (Katie), born December 12, 1983. On various occasions during the marriage respondent abused and assaulted petitioner; by October 1985 his physical assaults on her had become(174a) frequent. Apparently realizing that his abuse of her was endangering the marriage, he obtained an improperly issued ex parte order (Pb16; 18a) for temporary custody of the children (whom he had hitherto mostly ignored) and used it to bar petitioner from them and from the marital home. As a result of atrociously bad legal advice, she was reluctantly persuaded that she had no alternative to signing a "temporary" consent order allowing the father custody because, the lawyer she consulted told her, she had no home to take the

children to and would only be allowed to see them on a visitation basis. 178a. He omitted the word "temporary" from the consent order. (208a.) Petitioner filed for divorce for cruelty. 25a-31a. On October 21,1990, it was put on the record that her allowing respondent to divorce her for "desertion" was not to be used against her "in any future proceeding in regard to custody." (100a.)

Petitioner remarried in 1987. Having been told by her attorneys that she would then be able to get custody, she sought it but was denied, as was her request for a psychological evaluation of the children. (116a-117a.) In 1988 her present,pro bono attorney requested a hearing on the issue of custody, urging that: there has never been a hearing; that the "consent" to the custody arrangement had not been informed and that petitioner's susceptibility to bad legal advice had roots in her psycho-

logical state resulting from respondent's assaults (the"battered-woman syndrome," see State v. Kelly, 97 N.J. 178 (1984),); that, even if not void ab initio, whatever "consent" that she had given in 1985 she had since withdrawn; that there had been a substantial change in the circumstances (the original baby-sitter, a cousin well-known to the children, had been succeeded by a nuumber of unsatisfactory ones and petitioner was happily remarried, the full-time mother of a baby of that marriage, and completely recovered from the battered-woman syndrome).

Petitioner further alleged that the children are very unhappy about the custodial situation and are entitled to a best-interests hearing, which, under New Jersey statutory and case law, would include an interview of the children by the judge to determine if they are "of sufficient age and capacity to reason so as to

form an intelligent preference as to custody" and, if so, to "consider and give due weight " to their wishes in making an "award of custody or modification thereof," N.J.S.A. 9:2-4. Lavene v. Lavene, 148 N.J. Super. 267, 272 (App.Div. 1977), construed this statute to require such interviews of all children of school age:

> ... unless the trial judge expressly finds as a result of its interview either that the child lacks capacity ... or ... does not wish to express a preference, the child should be afforded the opportunity to make her views known. We would think that any child of school age, absent the express findings we have indicated, should have that opportunity and that the judge would be assisted thereby. Id.

The children in this case were six and five when petitioner requested the hearing. They are now eight and six and 3/4.

On the return date of the motion, January 6, 1989, the Chancery Division judge denied petitioner's request for

the hearing and refused to talk with the children. It should be noted here that he has also forbidden petitioner from having the children psychologically evaluated. However, petitioner's allegations about the children's distress (and all she seeks is an opportunity to prove her allegations) are corroborated by the fact that a child-study team, commissioned by Bobby's school to evaluate why this intelligent child is not doing well at his studies, concluded that his work is "undercut by affective distress," and by the fact that a specialist consulted for Katie's problems with incontinence recommended, among other measures, psychotherapy. Moreover, Bobby has written a letter to the"judje" saying "I agree with Mommy." (228a; 237a.)

It should also be noted here that, although petitioner has submitted the affidavits of a number of people (183a)

corroborating her allegations, respondent has never, in all of the paperwork generated by this case, submitted any other affidavits but his own; that is, none of his allegations -- which he so tenaciously strives to remain untested by a hearing -- have ever been corroborated by anyone.

The Appellate Division affirmed both the denial of a hearing and the refusal to talk with the children in a two-judge unreported opinion that is rife with factual and legal error. For instance, it repeats respondent's unsubstantiated allegations in his application for the ex parte order without noting that petitioner has denied them. Also, it distorts petitioner's candid statement that "the children love their father" (it is a rare child who does not love even an abusive parent) and that she "would never interfere with that love"

into something very different when it asserts that "Ms. Glassbrenner [sic] agrees that they have a close, loving relationship with their father." (16D-19; 22D-6.) On the contrary, the whole purpose and thrust of petitioner's quest for a hearing is the children's unhappiness.

Since petitioner's relationship with her children is substantial, it seems clear that she has standing to raise the question of their rights under the United States Constitution. If, as she noted in her brief below, physicians can assert the constitutional rights of their patients, Singleton v. Wulff, 428 U.S. 106 (1976), and a tavern owner the rights of her customers, Craig v. Boren, 429 U.S. surely a parent can urge the due process rights of her otherwise voiceless children.

A number of organizations sought

permission from the New Jersey Supreme Court to be amici curiae in this case, including the National Association of Counsel for Children, the Mothers' Alliance for the Rights of Children, Children's Rights of America,Inc., the New Jersey Coalition for Battered Women, and Odyssey Institute Corporation of Connecticut; they all supported petitioner's plea for a hearing.

REASONS FOR GRANTING THE WRIT

Petitioner, who as a battered wife lost custody of her two children, seeks a hearing: the essence of due process.

Stanley v. Illinois, 92 S.Ct. 1208, 1212, 405 U.S. 645, 31 L.Ed.2d 551(1972), in holding that the State could not (on both due process and equal protection grounds) take the children of an unwed father, who had custody after the mother's death, without a hearing, stated:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." (Quoting Kovacs v. Cooper, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949), Frankfurter, J., concurring.)

Quilloin v. Walcott, 434 U.S. 256, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), which held that the unwed father of a child who had played

no significant role in his son's life could not prevent his being adopted by the boy's stepfather, stated:

> ... it is now firmly established that "freedom of choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." (Quoting Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40, 94 S.Ct. 791, 796 39 L.Ed.2d 52 (1974).) 98 S.Ct. at 554-55.

The twelve-year-old boy had "himself expressed a desire to be adopted." Id. 553.

M. v. K., 186 N.J. Super. 363 (Ch. Div. 1982), held that a four-year-old girl was a "person" entitled to protections afforded by the United States Constitution and that applying a statutory privilege for communications between her parents and a marriage counselor would deprive her of:

> ... due process to which she is entitled; that is, the right to have introduced in this proceeding material evidence relevant to a determination of what custodial

> arrangement is in her best interests and welfare. Id. at 373.

Petitioner is seeking to have her children's "evidence" -- which is surely "material" -- heard on the question of their custody. (At what age and under what conditions the custodial wishes of a child should be determinative is not in issue here --- all that petitioner seeks for her children is the right to be heard.)

Where the United States Supreme Court has curtailed due process rights on the basis of youth, it has been to protect the children from abuses. Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 165, 64 S.Ct. 438, 441=42, 88 L.Ed. 645 (1944), in upholding a statute restricting minors' use of the streets for selling merchandise, said:

> It is in the interest of ... the whole community, that children be both safeguarded from abuses and given the opportunity for growth

> into free and independent well-developed ... citizens.

It could hardly be considered an "abuse" ro grant children the due process right (provided under the New Jersey statute) to tell the judge who controls their custodial fate what their custodial preference is. On the contrary, depriving children who want to express their preference in the matter could be considered abuse. According to James Garbarino, Edna Gutterman and Janis W. Seeley in The Psychologically Battered Child, Jossey-Bann, San Francisco (1986), a refusal to listen to a child and acknowledge the legitimacy of the child's needs is one of the five forms of psychological maltreatment they discuss. And Dr. Lee Salk, noted psychologist, believes that, if authorities are sympathetic to the wishes of children and let them participate in decisions about their future, they will

be far less likely to experience "the emotional trauma of distress, defiance, depression, guilt and anxiety" that ordinarily accompany divorce. Salk, What Every Child Would Like Parents to Know About Divorce, p.61, Harper & Row (1978). And as Professor Leontine Young said in Life Among the Giants, (McGraw Hill):

> The word dignity is one frequently to be heard these days. Democracy stands for human dignity; totalitarianism destroys it.... [Yet] we seem to confine its value so much to humans of grown size. Id. at p.117

Given the large numbers of children who are the subject of custody proceedings in this country, their psychological well-being is a matter of great importance, and such sociological considerations are relevant to determinations of constitutional rights. See Brown v. Board of Education, 75 S.Ct. 753 (1955).

As stated in Krafte, "Tinker's Legacy: Freedom of the Press in Public

Schools," 28 DePaul L.Rev. No.2 (1979), In re Gault, 387 U.S. 1 (1967), Ginsberg v. New York, 390 U.S. 629 (1968), and Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), "initiated and furthered the development of the concept that children are persons under the Constitution and therefore should be protected by it."

The wishes of the twelve-year-old boy in Quilloin v. Walcott, supra, were heard and respected. The eight-year-old and close-to-seven-year-old children in this case, petitioner respectfully submits, want to be heard, are capable of being heard, and, as a matter of the most basic due process, should be heard. Furthermore, that is the promise and mandate of N.J.S.A. 9:2-4. Where, as here, a State mandates and promises a right or privilege, the arbitrary denial of it in a particular case is a denial of due process,

even if the right were not constitutionally mandated.

As Justice Frankfurter said in his concurrence in May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953):

> The child's welfare must be the controlling consideration whenever a court which can actually lay hold of a child is appealed to on behalf of the child. 73 S.Ct. 907.

Petitioner's request for a hearing is (although grounded also in her own due process rights) inextricably bound up with her request that her children be heard on their own behalf. To whatever extent it might be thought that the unfortunate consent agreement as to custody that she entered into under the influence of her battered state and bad legal advice should carry any weight at all, it is instructive to note the words of the Supreme Court when it held that South Carolina was not precluded by the

Full Faith and Credit Clause from determining the best interests of children whose custody order had been entered in Virginia, because under Virginia law a contract between parents does not bind a Virginia court in a custody case one way or the other. The Supreme Court added:

> Questions of child's custody frequently cannot be left to parents' discretion, especially where parents' estrangement beclouds parental judgment with emotion and prejudice. Ford v. Ford, 371 U.S. 187, , 83 S.Ct. 273, , 9 L.Ed.2d 240 (1962).

New Jersey law does not treat a custody agreement as dispositive either, "since the determining factor is the present and future welfare of the children," Sheehan v.Sheehan, 38 N.J. Super. 120, 125 (App.Div. 1955).

Petitioner respectfully submits that the writ of certiorari should be granted to correct a mistake and an injustice in this case and to prevent them in other cases.

APPENDIX

I D

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4263-88T5

SUSAN GLASBRENNER,

Plaintiff-Appellant,

v.

ROBERT M. SAPIO,

Defendant-Respondent.

Argued December 19,1989
Decided February 6, 1990
Before Judges Cohen and Brochin.
On appeal from the Superior Court of New Jersey, Chancery Division,Family Part, Camden County.
Priscilla Read Chenoweth argued the cause for appellant (Priscilla Read Chenoweth, attorney; Ms Chenoweth, on the brief).
John S. Eory argued the cause for

respondent (Klein, Cettei, Halden & Eory, attorneys; Mr. Eory, on the brief).

PER CURIAM

The principal issue raised by this appeal is whether , under the facts of this case, plaintiff, a divorced wife who is the noncustodial parent, was entitled to a plenary hearing on her application for a change of custody. The primary basis for her application was that she had remarried and given birth to children by her new husband, that she would be at home full time taking care of those children, and that she would therefore be in a better position to care for the children of her first marriage than their father would be because he had not remarried and he was employed. We hold that a plenary hearing was not required and we therefore affirm the judgement entered by the trial court.

Plaintiff Susan Glassbrenner and her former husband, defendant Robert M. Sapio, Jr., were divorced December 26, 1986. They are the parents of two children, Robert, born September 22, 1982, and Katherine, born September 12, 1983. On October 15, 1985, when Robert was two and Katherine three years old, Mr. Sapio instituted an action to gain custody of both children. In his complaint and verified petition in support of his application for custody, he alleged that his wife was unfit to undertake the responsibility of their children. He stated that she had made a serious attempt at suicide less than two weeks earlier, that she had moved out of their marital home, and that she had told him that she was no longer interested in raising their children. Mr. Sapio claimed that he was able and willing to take care of the children and that he was then doing so.

In response to these papers, Ms. Glassbrenner retained an attorney and entered into a consent judgement entered November 1, 1985. The judgement recites that she "knowingly and voluntarily waived her right to file an Answer to the Complaint for custody" and that, "with the benefit of independant legal counsel of her own choosing," she had agreed to its terms. The judgement awarded custody of the children to Mr. Sapio, Provided for visitation by Ms. Glassbrenner, and implied that when she returned to employment, she would contribute an amount to be agreed upon to the children's support. At the foot of the judgement is a statement signed by both parties and witnessed by their attorneys, acknowledging that each of them voluntarily accepted the judgement, "free of duress by the other and with the advice of independent legal counsel of our own choosing." The state-

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ment further acknowledges that both parties are "satisfied with the legal services rendered by our respective counsel and understand that the terms of our Stipulated Settlement...are enforceable as if said terms were an Order of the Court."

On November 15, 1985, Ms. Glasbrenner , represented by the same attorney who had witnessed her acknowledgment that the custody judgement was fair and voluntary, filed a complaint for divorce on the ground of extreme cruelty. She alleged specific acts of drunkenness, physical abuse and public humiliation. Her complaint stated that the parties' two children were "temporarily in the custody of [her husband] pursuant to a consent order ." The prayer for relief asked for dissolution of her marriage, equitable distribution and the resumption of her maiden name, but she did not ask for custody

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of the children.

Mr.Sapio's answer denied the allegations of extreme cruelty and denied that his custody of the children was only temporary. His counterclaim sought a judgment of divorce based on alleged acts of extreme cruelty on the part of his wife. Ms. Glassbrenner denied these allegations.

Prior to the trial of their divorce action, Ms. Glassbrenner and Mr. Sapio both moved to have the court set a visitation schedule. In response to those motions, the court ordered a "comprehensive Psychological and Visitation Evaluation." The psychologist who prepared the evaluation reported that both parties would be adequate parents capable of assuming custody of the children. About the children's relation to Mr. Sapio, the report states:

The children were very affectionate toward their father, and it was evident

> that they are very comfortable and psychologically bonded to him. With the absence of his wife, it is quite clear that the children have become the central focus of Mr. Sapio's life.

The report says about Ms. Glassbrenner:

> Mrs. Sapio [now Glassbrenner] is conflicted in that she wants to be taken care of herself, and at the same time, she does want to take care of her children. There is nothing in her psychological test profile, however, to indicate that she is hostile, vindictive, or purposely desiring to injure or abuse her children.

Comparing Mr. Sapio and Ms. Glassbrenner, the report concludes:

> [O]f the two, Mr. Sapio is the more emotionally involved parent. I see him as attentive and concerned about

> the children. Although Mrs. Sapio cares about them, I see her as less attentive and less actively involved than her husband. She must know that she does need to supervise them a little more closely. However, Susan Sapio is not abusive, and is not psychologically unfit as a parent.

On June 11, 1986, following receipt of the psychological evaluation report, the court entered an order which confirmed Mr. Sapio's continuing custody of the children. The preamble of the order states that the parties reached an agreement about visitation and that "the parties themselves...confirmed in open Court that the terms of visitation were satisfactory and agreeable."

On July 11, 1986 Mr. Sapio moved to compel Ms. Glassbrenner to pay child support. Over her opposition, the court

entered an order on August 19, 1986, directing her to pay Mr. Sapio $50 a week for the support and maintenance of the children.

On December 24, 1986, a final judgement of divorce was entered by consent on the ground of desertion. The judgement recites that each party testified in open court that their settlement was fair and reasonable, and that it was entered into without coercion or duress and after consultation with counsel. Among other things, it orders that Mr. Sapio shall have custody of the two children pursuant to the consent judgment of custody previously entered, and that Ms. Glasbrenner shall pay $50 a week child support.

On May 27, 1987, Ms. Glasbrenner moved for custody of the two children. By that time they were approximately three and a half and four years old and had been in their father's sole custody for more than

a year and a half. In her affidavit submitted in support of her application, Ms. Glasbrenner stated:

> In the Final Judgemnt of Divorce dated December 24, 1986 I consented to custody of the two (2) infant children of the marriage being with the defendant. This was simply a continuation of the status quo which had exisred between the defendant and I from the time of our separation on October 9, 1985.

As grounds for the change of custody which she requested, Ms. Glassbrenner argued that she had remarried and had a comfortable house in which the children could live, and that is she was awarded custody, she would terminate her employment and care for them full time. This arrangement, she claimed, would be better than the children's continuing to be cared for by a succession of temporary helpers:

By way of summary, the children 's lives would be much more in order if they were with me on a full-time basis. I will see that my children are dressed appropriately and that their clothing is always in order. My children will go to bed each night at a fixed and definite time; they will eat properly and receive home-cooked and nutritionally-balanced meals and I will generally take care of the "little things" that can only be addressed if a conscientious parent is properly seeing to these needs on a full-time basis.

She concluded:

I am not taking the position that my ex-husband is an unfit parent, but it is rather apparent for many reasons that our children are not recciving the quality care they would receive if one of their

> parents were with them administering to their needs on a full-time basis. I have no major complaint with the defendant nor his care for our children....

The trial judge held that Ms. Glassbrenner had not made a sufficient showing to justify a hearing, and he denied her application to reopen the issue of custody. He said:

> There is nothing that Mr. Sapio has done that would indicate the custody should be moved. There's no allegation the children are doing poorly in school. There is no allegation that they are unhealthy. There's no allegation in any way that the children are failing to thrive, it's not in there and without something to indicate that there is something wrong and that Mr. Sapio is not meeting his parental responsibility as

the custodial parent, there is nothing for me to do at this time but to continue the order of custody.

On November 6, 1987, Ms. Glasbrenner moved to be relieved from any obligation for child support. The grounds upon which she sought relief were that she was unemployed, she had exhausted her unemployment benefits, she was pregnant, and she did not intend to return to work when her baby was born. Mr. Sapio opposed any relief to his former wife except to excuse her from making support payments for six weeks following delivery. He cross-moved to compute and to enter judgment for the amount of unpaid child support owed by his former wife. Mr. Sapio insisted that she should not be treated any differently from a husband who was the non-custodial parent, who had a second family, and who sought to avoid his obligation to the children of his

first marriage. The motion judge agreed and relieved Ms. Glasbrenner from child support obligations only for a period beginning six weeks before and ending six weeks after the birth of her child.

On December 9, 1988, Mr. Sapio moved to enter judgment on the $870 of child support arrears which the court had found to be due and unpaid and upon the $480 counsel fee which it had awarded. In response to that motion, Ms. Glassbrenner moved to set aside the award of a counsel fee, to reconsider the support obligation imposed upon her, to reopen the issue of custody with a view to awarding her custody of the children and, for that purpose, to hold a plenary hearing, and top grant other miscellaneous relief. By an order dated April 3, 1989, the court denied Ms. Glasbrenner's application for a plenary hearing on the issues of custody and child support, entered

judgement for counsel fees and arrearages of child support, and denied most of the other miscellaneous relief which she had requested. Her appeal is from that order.

The trial court denied Ms. Glassbrenner's application to reopen the issues of custody and child support on the ground that the affidavits submitted on her behalf did not make a sufficient showing of changed circumstances since entry of the divorce judgment to warrant a plenary hearing . She disputes that conclusion. We therefore turn to the proofs which she submitted in support of her motion.

Eight affidavits were presented to the court in support of Ms. Glassbrenner's motion. However, only her own affidavit bears on the issue to changed circumstances. She states that the person whom her former husband first hired to

care for the children during the day while he was at work quit before long to have a baby of her own. That person was succeeded by a series of six different caretakers. On the date of the affidavit and for a month or two previously, a permanent caretaker had been unavailable and the children sometimes went to their grandmother's after school, sometimes to their aunt's sometimes elsewhere. Both children frequently had perianal and crotch rashes which their mother thought were probably the result of insufficient attention to cleanliness, "untreated cuts, grimy underclothes, blisters on their feet from wearing shoes without socks... [and] problems with continence, particularly at night."

Ms.Glassbrenner also states in her affidavit:

I know that the chilren love their father and that he loves them, and

I would never interfere with that love. However, he works during the week and is not in a position to care for them properly. I am a home maker (an honorable profession) and what I have to offer my children is better than money: care, time, attention, and love. It does not seem right that I should be expected to put my 10-month-old son in some kind of day care so I can work to earn money to pay defendant money to pay for some kind of day care for my five and six-year old children, when I could be giving all of them (and I have just discovered that I am pregnant again: the best care in the world -- their mother's care. When their father is not working, on weekends, summer vacations, etc., and can care for them, is the appropriate time for them to be with him.

Do these allegations warrant a plenary hearing on the issue of custody? We hold that they do not. First of all, we start from the premise that in custody litigation, as in every other category of litigation, a plenary hearing is required --constitutionally mandated--whenever material facts are in genuine dispute. See e.g., In re Crowley, 193 N.J. Super. 197, 209 (App. Div. 1984); Hallberg v. Hallberg, 113 N.J. Super. 205, 207-208 (App. Div. 1971). For the following reasons, however, the facts which MS. Glassbrenner has alleged are not material because, even if they were proved to be true at a plenary hearing, they would not justify an order transferring custody of the parties' children from Mr. Sapio to Ms. Glasbrenner.

For sufficient reason, a court has the authority to determine or to alter the custody of minor children at any time.

See Borys V. Borys, 76 N.J. 103, 111 (1978); Mimkon v. Ford, 66 N.J. 426, 438 (1975); Wilke v. Culp, 196 N.J. Super. 487, 494 (App. Div. 1984), certif. den. 99 N.J. 243 (1985. For either decision, the determinant is the best interests of the child. See Matter of Baby M., 109 N.J. 396, 452-463 (1988); Mayer v. Mayer, 150 N.J. Super. 556, 565 (Ch. Div. 1977), Certif. den 88 N.J. 494 (1981). However, an initial determination of custody following a divorce involves somewhat different considerations from an application to alter a custody decision which has remained in effect for some period of time. Some disruption of the child's life and relationships is an almost inevitable consequence of divorce and the award to one parent or the other. However,

the further disruption which would result from a subsequent change of custody is not an inevitable consequence of the original divorce. Either a fundamental error in the original award of custody or a substantial change of circumstances detrimental to the best interests of the child must have occurred before the further disruption consequent on a change of custody is appropriate. When a child, particularly a very young child, has lived in one parent's physical custody for a substantial period of time, the disruption of that relationship is likely in most circumstances to have seriously detrimental effects on the child. See Hoy v. Willis, 165 N.J. Super. 265, 272-277

(App. Div. 1978). No doubt that is at least one of the reasons for the rule that the party seeking a change of custody had the burden of proving changed circumstances. Mastropole v. Mastropole, 181 N.J. Super. 130, 136- 137 (App. Div. 1981) ("... neither the changes in plaintiff's marital status or living arrangement nor plaintiff's bare assertion that he could take better care of Salvatore than defendant justified the major change in Salvatore's lifestyle which the trial judge ordered.") Sheehan v. Sheehan, 51 N.J. Super. 276, 287 (App. Div. 1958L, certif. den. 28 N.J. 147 (1958).

In the present case, the two Sapio Children have lived with their father since Robert was three and Katherine two years old. They are now six and seven years old. Ms. Glassbrenner agrees that they have a close, loving relationship with their father. Under these circumstances, we agree with the trial judge that despite their continuing relationship with their mother which, no doubt would somewhat mitigate the adverse consequences of a change of custody, her allegations about Robert's problems in school[1]

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1 The children have been so continously the subjects of such bitter conflict between their parents that the wonder is that they do suffer from developmental problems substantially more serious than those which have been described. Everyone interested in the children's welfare can only pray that the parents will both finally stop fighting over

> the children, tormenting them with the parents' unresolved conflicts and hostilities.

or the children's minor deviations from preferred standards of personal hygiene, even if proved at a plenary hearing , are clearly inadequate to warrant terminating Mr. Sapio's custody after all the time that has elapsed. Cf. Bengali v. Haveliwala, 197 N.J. Super.55, 61 (Ch.Div. 1984)(A plenary hearing is not warranted where "the alleged factual assertions of plaintiffs are nothing more than assumptions and conclusions, amounting to no more than pure conjecture.")

The rule which we stated in M.P. v. S.P., 169 N.J. Super. 425, 431 (App.Div. 1979) is applicable here:

> The party seeking the modification [of custody arrangements] bears the burden of showing sufficient changed circumstances so a to require modification. [Citations omitted.] In

> assessing a claim of change circumstances deference is given to the length and stability of the existing custody relationship. [Citations ommited.] The potential for damage which resides in removing a child from its psychological parent has been recognized in a number of cases .... So important is the factor that our Supreme Court pointedly stated in Sorentino v. Family & Children's Soc. of Elizabeth, 72 N.J. 127 (1976), that one seeking to change the child's custodial status quo "...will have the burden of proving by a preponderance of the credible evidence that the potentiality for serious psychological harm accompanying or resulting from such a move will not become a reality. [at 133]."

This conclusion also disposes of Ms.

Glasbrenner's argument that, even if she has not shown sufficient change of circumstances, considerations of the children's best interest dictate a change of custody. We agree with the trial judge that her affidavits do not allege facts which show that a change would be in the children's best interest.

As an alternative argument, Ms. Glassbrenner contends that her motion should be treated as an original application for custody rather than as an application for a change of custody after an original determination made at the time of the November 1, 1985 judgment of divorce. If her application is viewed from that perspective, she contends, she will be entitled to custody if she

can prove that, all things considered, she can provide better care for the children than their father can. Therefore, she maintains, she is entitled to a plenary hearing to prove her superiority as a caregiver.

The substance of Ms. Glassbrenner's argument for disregarding the October 25, 1985 judgment for custody and the provision ratifying it which is contained in the December 24, 1986, judgment of divorce is that when she agreed to their provisions she was poorly advised, she was distraught, she was coerced, and she was especially prone to succumb to pressure from her husband because she was suffering from the battered-wife

syndrome. The trial judge rejected that argument, and we agree with him for two reasons. First of all, Ms. Glassbrenner's affidavit does not allege specific facts which, if proved at a plenary hearing, would tend to establish her contentions. To prevail, she would have to prove that the award of custody of the children to Mr. Sapio was the product of fraud, duress or other inequitable conduct which would warrant relief from the custody judgment and the divorce judgment either under R. 4:50-1 (f), cf. Rosen v. Rosen, 225 N.J. Super. 33, 36-37 (App. Div.) certif. den. 111 N.J. 649 (1988), or by a collateral attack upon the judgment of the sort preserved by R. 4:50-3, cf. Hyland v. Kirkland, 157

157 N.J. Super. 565, 583-584 (Ch. Div. 1978). She has not alleged such facts.

Our second reason for agreeing with the trial judge's rejection of Ms. Glassbrenner's argument for disregarding the prior judgments is that both we and the parties have to recognize that those judgments, even if they were obtained by fraud, duress or other inequitable conduct, have ordered the relationships between Ms. Glassbrenner, Mr. Sapio and their children for half of the children's lives. Hence, even if we were to conclude that the original custody judgment was erroneous, a transfer of custody now would not be justified without a showing that, taking into consideration the potentially disruptive effects of such a change, the transfer would nonetheless serve the best interests of the children. Cf. Matter of Baby M., Supra, 109 N.J. at 456 (1988) ("The custody decision must be

based on all circumstances, on everything that actually has occurred, on everything that is relevant to the child's best interests.") As we have already indicated, we agree with the trial judge that Ms. Glasbrenner has not shown facts which, if proved, should persuade the trial court that the children's best interests require that their custody be transferred from their father to their mother.

As a further argument in favor of a plenary hearing on the custody issue, Ms. Glassbrenner asserts that "The children whose custody is in issue in this case have a right to be heard." However, we disagree with that contention. Absent a substantially greater showing than Ms Glassbrenner has made domonstrating that the children's best interests require a change in their custody, their ages are such that their preferences are not enttiled to a material effect on the courts

decision. See Palermo v. Palermo, 164 N.J. Super 492, 499 (App. Div. 1978); Lavene v. Lavene, 148 N.J. Super. 267, 272-273 (App. Div. 1977) on remand 162 N.J. Super. 187 (1978).

Ms. Glassbrenner also challenges the trial court's denial, without a hearing, of her application to have her former husband evaluated by a substance abuse counselor. However, her argument on this issue suffers, to an even more pronounced extent, from the same flaw that infects her arguments with respect to the other aspects of her case, the absence of an adequate factual showing. To justify subjecting Mr. Sapio to evaluation by a substance abuse counselor, she alleges only that he abused alcohol during their marriage and that alcoholism is not curable. There is no showing whatsoever that Mr. Sapio is currently abusing alcohol or any other drug. We agree with

the trial court that Ms. Glassbrenner's allegations on this issue were insufficient to warrant either the order requested or a plenary hearing to pursue the question further.

The primary objective of Ms. Glassbrenner's appeal has been to obtain custody of the two children of her marriage with Mr. Sapio. She also argues, however, that if she is denied custody, her obligation to contribute to the children's support should be terminated or suspended until the two children of her present marriage are older. She argues that it is unreasonable to require her to pay for someone else to care for the two young children of her present marriage so that she can go out to work to earn enough to pay her former husband to hire someone to care for the two young children of her first marriage. Despite the superficial persuasiveness of that

argument, the trial court rejected it and, in the context of the particular facts of this case, so do we.

Under New Jersey law, both parents are "equally charged with [the] care, nurture education and welfare . . . of [their] children." N.J.S.A. 9:2-4; C. v. R., 169 N.J. Super. 168,171 (Ch. Div. 1979). Cf. Lynn v. Lynn, 165 N.J. Super. 328, 342-343 (App. Div.), certif. den. 81 N.J. 52 (1979); Pieretti v. Pieretti, 13 N.J. Misc. 98, 103, 176 A. 589, 592 (N.J. Ch. 1935). In this case, a support obligation was imposed on Ms. Glassbrenner by court order because she was the non-custodial parent. N.J.S.A. 2A:34-23. When she re-married, her legal and moral obligation to the children of her first marriage continued. The court and her former husband have no concern with whether or not she chooses to work outside the home. But they have a right to insist that she

fulfill her continuing obligation to the children of her first marriage. We agree with the trial court that, except for the suspension of her obligation to pay support during a period of six weeks before and six weeks after giving birth, she was not entitled to preferential treatment as compared with a non-custodial father. A new family did not relieve her of her pre existing support obligation any more than it would relieve him of the comparable obligation.

Ms. Glasbrenner's remaining contentions, that the award of counsel fees to Mr. Sapio should not have been reduced to judgment and that the trial judge was "committed to unsubstantiated findings and surrealistic views of 'gender bias,'" are without substantial merit. R. 2:11-3 (e)(1)(E).

The judgment appealed from is affirmed in all respects.

SUPREME COURT OF NEW JERSEY
C-776 September Term 1989
31,590

ON PETITION FOR CERTIFICATION
FILED
May 4, 1990
/s/Stephen Townsend
CLERK

SUSAN GLASBRENNER,

Plaintiff-Petitioner,

vs.

ROBERT M. SAPIO,

Defendant-Respondent.

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-4263-88T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 1st day of May, 1990.

/s/Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-1242 September Term 1989
31,590

ORDER
FILED
SUPREME COURT
June 11, 1990
/s/Stephen Townsend
CLERK

SUSAN GLASBRENNER,

Plaintiff-Movant,

vs.

ROBERT M. SAPIO, JR.,

Defendant-Respondent.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 7th day of June, 1990.

/s/Stephen Townsend
CLERK OF THE SUPREME COURT